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In the Supreme Court of the United States

OCTOBER TERM, 1964

GLADYS JORDAN, Petitioner,

v.

STATE OF LOUISIANA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA IN THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, LOUISIANA

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"One who is instigated, included or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing, may avail himself of the defense of "entrapment". Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent." *Lashley v. State*, 67 So.2d 648, 649; In re *Davidson*, 185 Pacific 2d 354, 357; 64 Nev. 514. The rule in deception, trickery or artifice does not constitute entrapment where it merely furnished an accused an opportunity to commit a criminal act previously planned by him is particularly true where the crime is one that is usually committed

in secret and is of such a depraved character that the public must be protected. Especially is it true in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnishes the evidence of a course of conduct. In fact, it has been held that in such cases the entrapper may even provoke or induce the commission of a particular violation of the law, if he knows or has reasonable grounds to believe that the accused is a repeated or habitual offender. To render applicable the rule that deception, trickery or artifice does not constitute entrapment where it merely furnishes an accused an opportunity to commit a criminal act previously planned by him, it must appear that there were reasonable grounds for believing that the accused is engaged in or intends to engage in the unlawful activity, as where the accused is a known law violator; but such methods are not justified nor is a conviction sanctioned where there is no ground for suspicion. However, reasonable suspicion, and not probable cause, that one is engaging in particular criminal behavior is all that is necessary before the police authority may invite to engage in particular criminal behavior. Accordingly, the fact that accused had no previous criminal record or reputation, and that, although he had many opportunities he had never before attempted to do the alleged criminal act, is a consideration tending to support the defense of entrapment. 22 CJS 45 (2) Page 145.

Thus, where an officer called a person suspected of practicing medicine without a license and com-

plained of a chest pain and requested treatment, and such person called on the officer and treated him, there was not entrapment. *T. C. Aitchison v. U.S. Municipal, Appellant*, 98 Atlantic 2d 791. Also where a police woman who was treated and prescribed for by the accused, had planned with officer of the State Medical Association to call on the accused for purpose of securing evidence against him and had, by representing herself to be ailing, although she was well, secured evidence on which he was convicted of practicing medicine without a certificate, and accused did not testify that he did not have any purpose of intent to commit the offense alleged, and it clearly appeared that he did the acts which constituted such practice, entrapment had not occurred. *State v. Gutilla*, 116 NE 2d 208, 94 High Appeals 469. It has also been held that where an attorney employed by a dental association secured a witness merely to afford the accused an opportunity to violate the statute requiring a license for the practice of dentistry, and such witness did not have to use persuasion or inducements to get accused to examine his mouth and make an impression of his teeth, and prepare witness for a partial plate, witness, under such circumstances, merely afforded the accused an opportunity to violate the law, and such conduct on part of the witness did not constitute entrapment. *Crosbie v. State, CR.*, 330 Pacific 2d 602.

It has also been held that when a police officer expressed an interest in a particular girl whereupon the accused procured her at the police officer's request was not fatal to conviction for procuring as

entrapment. *Bolick v. State*, 309 SW 2d 74, 165 Texas Criminal 493. It has also been held that an officer who made a false representation to female operator of a date and escort bureau as to officer's residence in the city in an effort to ascertain whether prostitution was being practiced, and indicated he would like to meet a girl, did not establish the defense of entrapment. *State v. Poague*, 72 NW 2d 620, 245 Minn. 438. Where a police officer in disguise went to a bar room and inquired of the manager "Where are all the women" and "What is the price" whereupon the manager designated a certain woman employee in the place "could be had" and whereupon the manager gave the woman employee permission to leave the place for forty-five minutes with the officer in disguise, it was held that this was not entrapment to a charge of operating a house of ill fame against the manager. *Lashley v. State*, 67 So.2d 648. The court said that in "such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and *merely furnished* the opportunity for the commission thereof by one who had the *requisite criminal intent*." For example it has been held that more than an offer to buy narcotics is necessary to constitute entrapment of the seller. *Vanvas v. U.S.*, CCA Fla 13 Fed.2d 347; *Kline v. U.S.*, CCA Arizona, 9 Fed.2d 621. *Smith v. State*, 13NE2d 562, 214 Indiana 169. Rehearing denied 14 NE.2d 1017, 214 Indiana 169; *U.S. v. Linderfield CCANY*, 142 Fed.2d 829, Certiorari denied, 65 Sup.Ct. 89, 323 U.S. 761, 89 L.Ed. 609.

U.S. v. Abeallah CCANY, 149 Fed.2d 219, Certiorari denied, 66 Sup.Ct. 29, 326 U.S. 724, 90 L.Ed. 429.

General rules of entrapment apply to prosecutions for the unlawful importations, sale or possession of narcotics; and the use of deception in detecting an unlawful sale or possession of narcotics does not constitute entrapment when there is reasonable cause to believe that the law is being violated. 22 CJS, Section 45 (4) If an officer uses no more persuasion than is necessary to an ordinary sale of a narcotic and the accused readily is willing to make the sale to the officer, there is no entrapment. *People v. Ramos*, 303 Pacific 2d 783, 146 CA2d 110. Once the defense of entrapment has been raised, it is proper to inquire into the reputation of the accused to determine his pre-disposition to commit the offense or inquire into the reasonableness of the officer's conduct. *Washington v. U.S.*, Ct. Appeals Texas, 275 Fed.2d 687. In speaking of the law regarding entrapment as set forth in 22 CJS, Verbal Criminal Law Section 45, Page 99, the Louisiana Supreme Court said, "The rationale of this legal concept is that officers of the law shall not incite crime merely to punish the criminal. In keeping with this philosophy, which sustains it, the defense of entrapment has a limited application. It is restricted to those instances in which a defendant is induced or incited to commit a crime not originally intended or contemplated by him, for the purpose of arresting and prosecuting him. The fact that an opportunity is furnished or that the defendant is aided in the commission of a crime which originated in his

own mind constitutes no defense. That is a clear distinction between inducing a person to commit a crime and setting a trap to catch him in the execution of criminal designs of his own conception. In the judicial formulation of this doctrine, the primary emphasis is on the defendant's predisposition to commit the crime. These limitations, implicit in the doctrine itself, have been universally recognized." *State of Louisiana v. Jim Turner and Seymour Wheeler*, 127 So.2d 514, 241 La. 95.

With reference to the above authorities and particularly with reference to entrapment as it relates to the sale of narcotics, alcoholic beverages, there is no reason why the law as announced in those particular cases should not apply to a case of prostitution. It will also be noted by virtue of the above authorities that the defendant's predisposition to commit a crime is of paramount importance in order to distinguish whether there is an inducement to commit the crime or whether or not it amounts to a mere opportunity being furnished the accused to commit the crime. Thus evidence with reference to the knowledge by the officers of the reputation of this accused is relevant in a case where entrapment is urged as a defense. The purpose of this evidence being to show the predisposition of the accused and to show the reasonableness of the officers' actions in the alleged entrapment. *State of Louisiana v. Turner and Wheeler*, 241 La. 94, 127 So.2d 512. 22 CJS Section 45 (2), Page 145. The trial court stated in its pro curiam opinions dealing with the objections of evidence with reference to the

reputation or character of the accused as a prostitute, that this evidence was not accepted or considered by the court as an attack upon her character but was admitted specifically on the question of entrapment; was extremely relevant with reference to whether this was an inducement by the officers to the accused to commit a crime or whether or not it was a mere offer of an opportunity by the officers to one who was already predisposed to the commission of the crime.

Public policy favors the protection of the identity of informers, and, generally in the absence of statute discloser will not be compelled. Such policy, however, forbids only non-essential disclosure and disclosure may always be compelled in cases where identity of informer appears essential to the defense. No fixed rule with respect to disclosure of an informer in criminal prosecutions is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Where the informer had not merely given information to the arresting officers but was a participant with the accused in the illegal transaction charged, his identity is material to the defense and should be disclosed on request. 23 CJS Section 954B, Pages 786, 787. As the transcript will reveal and as stated at Page 6 of petitioner's brief

for petition of writs of certiorari herein, the informant in this case merely informed the police officer that this accused was a prostitute. Upon this information the police officer called her and arranged for a date. The arrangement, as stated, was that the police officer was to call her from a place in the general area of her home which he did, whereupon she, the accused, informed the deputy to wait in the general area from which he called her and as she would come by in her car, which she described, and lead him to her home, which she did. When the deputy first spoke to the accused in this case about this arranged date, she invited him over saying, "You'al come over, we will make a party of this, bring the steaks and a bottle of Cutty Sark." See transcript, page 128. The officer said I asked her, "How much will it cost?" She said, "What I told the person before. I said 'Is that $20.00?' She said, 'That is correct.' " See Transcript Page 129. Thus the evidence in this case reveals that the only thing that the informer did in this case was to, in effect, introduce this officer to the accused. The opportunity was merely furnished her to commit this crime. There was no persuasion on the part of anyone to induce her to commit a crime which she had no intention of committing. Other than this introduction, the informer had nothing to do whatsoever with this case. He did not participate in any manner during the commission of this crime by the accused. Thus the cases heretofore cited which hold that the mere offer to one, who by accepting, commits a crime because he was predisposed or had the intent to do

so is not entrapped, are applicable to this case at bar. Since the record clearly reveals that the informant did not participate in any manner in this offense other than to introduce the officers to this accused over the telephone, disclosure of his identity could not conceivably be essential to defense of this accused.

The Federal authorities cited by petitioner in support of their alleged contentions herein are all consistent with the views expressed by the authorities cited in respondent's brief herein. In *Rovilo v. U.S.* cited by petitioner, the informant therein was the sole participant in the offense charged and under which the conviction was had. Thus this Honorable Court held disclosure was essential because of that reason. In the case at bar the informer was a non-participant in the offense charged. In *Sherman v. U.S.* cited by petitioner in her brief on the question of entrapment, the defendant in the Sherman case was found to have been entrapped into the offense charged by the use of sympathy and repeated efforts of persuasion. There is no such showing in the case at bar. The defendant did not testify that she was induced into committing an offense of which she had no intention of committing. Entrapment is a positive defense, the invocation of which necessarily assumes that the act charged was committed. *Henderson v. U.S.*, CA Fla. 237 Fed. 2d 169, 172, 61ALR2d 666. Accordingly, while inconsistent defenses may generally be in opposed in a criminal case, it has been held that, although the defense of entrapment may be raised even the accused denies the commission of the act charged, where there

has been such a denial the defense of entrapment cannot be successfully availed of, since one basis of the defense is absent. *Rogdriguez v. U.S.*, CA Texas, 227 Fed.2d 912. Thus in the case at bar by pleading not guilty and in effect denying the commission of this alleged offense, the accused necessarily waived her right to claim entrapment therein since entrapment necessarily admits the offense charged. 22 CJS 45 (1) Pages 137, 138.

CONCLUSION

In view of Rule 19 of this Honorable Court's rules which provides:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

this petition for certiorari should be denied.

Respectfully submitted,

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